identification of the respondents to the part played by each of them. It is my considered view that it was not the intention of the legislature that all persons who are merely found at an assembly for which no licence had been issued under section 27 of the Police Act shall be guilty of an offence. If so, it would have said so and employed the words of section 144 of the Penal Code which provides "any person who attends, takes part in or is found at any unlawful assembly." It seems to me, therefore, that where the prosecution might succeed in a charge under the Penal Code by proof of mere presence supported by fact of arrest at an unlawful assembly it must go beyond that for a charge under section 27 of the Police Act by showing not only that the accused was present at the unlawful assembly but also that he did take part in that unlawful assembly. I accordingly hold that the learned magistrate was right in finding that the prosecution had failed to prove beyond a reasonable doubt that the 60 respondents did take part in the assembly.

There remains, whether at the close of the case for the prosecution, there was sufficient evidence for the learned magistrate to alter or add the charge under section 158 of the Criminal Procedure Code. I have given this matter anxious consideration and find that there is none. I hold that the learned magistrate was right in making the order of acquittal and discharge and I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Sri Ram, Chan & Chia; Karam Singh Veriah; Mah, Kok & Din; Lim Soh Wah & Co.; Atma Singh Veriah.*

TAN SIM SEE & ANOR. v. SEE CHEE PING

[O.C.J. (Arulanandom J.) September 15, 1975]
[Penang — Civil Suit No. 263 of 1975]

Practice and Procedure — Defendant's application to set aside writ by reason that it was defective — Infant suing by next friend — Consent of next friend filed after filing of writ — Irregularity curable — R.S.C. 1957 O.16 r.20 and O.70.

In this case, the plaintiff, an infant by her next friend, filed a writ against the defendant on August 18, 1973 claiming damages for injury suffered by the defendant's negligent driving.

The consent of the next friend was filed in court on August 24, 1973 and the defendant entered appearance on September 26, 1973.

On March 18, 1975, the defendant sought to have the writ set aside for want of prosecution or by reason that the writ was defective.

Held: (1) the defendant's claim to strike the writ out for want of prosecution was completely devoid of merit;

(2) an affidavit was filed with the writ by the father of the infant indicating that he had agreed to be appointed next friend for the purposes of the writ. Hence, if there was an irregularity in form, it could be cured under Order 70;

(3) the object of the Rules of the Supreme Court in making provisions for the striking out of writs is to save the time of the court in processing and proceeding with actions which are frivolous, vexatious and show no cause of action or in other words writs without any merit whatsoever. The purpose of the rules is not to enable defendants to come to court and waste the court's time by complaining the 'i's are not dotted or the 't's crossed in the hope of making a few paltry pennies in costs;

(4) courts should seriously consider when such unsuccessful applications to strike out writs are concerned, whether the solicitors responsible should be personally liable to pay costs;

(5) in the circumstances the application must be dismissed with costs.

Cases referred to:-

(1) *Attorney-General at & by the relation of Pesurohjaya Ibu Kota, Kuala Lumpur* v. *Wan Kam Fong & Ors.* [1967] 2 M.L.J. 72.

(2) *H. Stacey* v. *Diamond Metal Products Co. Ltd. & Anor.* [1935] M.L.J. 249.

CIVIL SUIT.

Triptipal Singh for the plaintiffs.

Abu Haniffa for the defendant.

Arulanandom J.: In this case, the plaintiff, an infant by her next friend Tan Ah Lat, filed a Writ in the High Court against the defendant on August 18, 1973 claiming damages for injuries suffered by the plaintiff as a result of an accident caused by the negligent driving of a motor car by the defendant on April 30, 1973 at about 2.00 p.m. along Penanti-Permatang Pauh Road.

The consent of the next friend was filed in court on August 24, 1973. The defendant entered appearance on September 26, 1973.

Since then no steps were taken by either party until March 8, 1975 when the plaintiff applied to have the Writ of Summons amended to have the next friend added as second plaintiff. On March 18, the defendant filed a Summons-in-Chambers to have the writ set aside on grounds stated in the affidavit of the solicitor in charge of the defendant's case dated February 4, 1975. The defendant prayed that the writ be set aside for want of prosecution or by reason that the writ was defective.

As for the complaint that there was want of prosecution on a perusal of the affidavit of Triptipal Singh, the solicitor for the plaintiffs, it is quite evident that owing to the circumstances of the case *viz.*, the plaintiff infant continuing to receive medical treatment and the delay on the part of the Medical Authorities in producing a final Medical Report on the plaintiff, the solicitors had by mutual agreement agreed to waive stipulations in the Rules of the Supreme Court as to the time of filing Statement of Claim, etc. In view of the said affidavit which was not denied in substance by the defendant's affidavit in reply of May 8, 1975, the court considered the defendant's claim to strike the writ out for want of prosecution as completely devoid of merit. The defendant filed his appearance in September 1973 and only gave notice of intention to proceed in February 1975. If there was no exchange of correspondence or indulgence shown by either side, the matter would have been prosecuted, but if there was delay the defendant himself was guilty of laches.

Secondly, the defendant claims the writ is defective. As to the grounds in paragraph 6 of the affidavit of Abu Haniffa dated February 4, 1975 *viz.* "(a) It does not state how the accident happened and the exact

location of the said vehicle and the place. (b) It is not dated. (c) There is a lack of particulars," the court finds it frivolous and of no substance whatsoever.

As to paragraph 7 of the same affidavit *viz.* "(a) An infant cannot sue in law except by the authority and consent of his next friend. (b) There is no evidence that the next friend, if any, before the Writ was filed, consented to act as such. (c) Under the provisions of the Rules of the High Court, 1957, the plaintiff has failed to file: (i) Consent of next friend to act as such; and (ii) Affidavit of solicitor of no adverse interest," it also lacks merit.

O.16 r.20 of our Rules of the Supreme Court reads as follows: —

"Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a consent to act as such next friend and such consent shall be filed."

It is not in *pari materia* with O.16 r.20 of the Rules of the Supreme Court of England, the difference being that while our section speaks of a signing a "consent" the English section refers to "written authority to the solicitor."

The purpose of our O.16 r.20 is to ensure that no person who has not agreed that his name can be used as next friend has his name so used. In this case an affidavit was filed with the writ by the next friend stating that he was the father of the said infant and a fit and proper person to be appointed next friend and that he had no adverse interest to that of the said infant. So when the writ was filed the next friend had agreed to be appointed next friend and I consider that if there was an irregularity in form it could be cured under O.70. In fact another consent by the next friend in conventional form was filed on August 24, 1973 even before the Memorandum of Appearance was filed. In the case of *Attorney-General at & by the relation of Pesurohjaya Ibu Kota, Kuala Lumpur* v. *Wan Kam Fong and Others*,[1] Justice Raja Azlan held that "in order to give validity to the use of the relator's name in an action his prior written consent to act as such must be filed at or before issue of the writ. Such consent is a condition precedent to the right to use the relator's name; it goes to the root of the matter for without it the nominal plaintiff has no *locus standi*." With that proposition I agree. But in that case there was no indication whatsoever when the writ was filed that the plaintiff had a right to use the relator's name. However in this case the affidavit filed with the writ indicated that the next friend agreed to be appointed the next friend for the purposes of the writ. Hence on the facts the instant case can be distinguished from the case cited.

Another ground for complaint by the defendant was that the consent of the next friend was not served on the defendant. Here again there is no merit as there is no mandatory provision that the consent must be served on the defendant.

A further complaint was that the affidavit purported to be the consent of the next friend was sworn before the writ was filed and reliance was placed on the case of *H. Stacey* v. *Diamond Metal Products Co. Ltd. & Anor.*[2] In that case application was made to use an affidavit of a deponent sworn before the filing of the writ as evidence and the court held it was inadmissible as the deponent was dead and was not available for cross-examination. In the present case the affidavit is not evidence for the purposes of the trial but merely as a consent for the next friend's name to be used. As long as it is filed with the writ the provision of the law must be deemed to be complied with.

For the above reasons, the summons is dismissed with costs.

It might be pertinent here to make a few observations about applications to strike out writs. The object of the Rules of the Supreme Court in making provisions for the striking out of writs is to save the time of the court in processing and proceeding with actions which are frivolous vexatious and show no cause of action or in other words writs without any merit whatsoever. The purpose of the rules is not to enable defendants to come to court and waste the court's time by complaining the "i"s are not dotted or the "t"s crossed in the hope of making a few paltry pennies in costs. It is equally not intended for parties to cause a prolixity of writs especially at a time when the court is so overburdened with writs that there is a huge backlog of cases. Order 70 specially seeks to prevent frivolous applications to set aside writs. In this case even if the court saw fit to strike out the writ the plaintiffs will file another writ on the same facts with the same cause of action and it is not the duty of the court to cause or encourage prolixity of writs. In fact courts should seriously consider when such unsuccessful applications to strike out writs are concerned, whether the solicitors responsible should be personally liable to pay costs.

Application dismissed.

Solicitors: *Triptipal Singh & Co.; Allen & Gledhill.*

ONG TUA CHOR v. LEE BENG TONG

[A.C.J. (Ajaib Singh J.) September 18, 1975]
[Seremban — Civil Appeal No. 3 of 1975]

Landlord and Tenant — Respondent landlord claims vacant possession of shophouse — Rent-controlled premises — Appellant erected illegal partition at front portion of the ground floor exposing respondent to a penalty — Breach of the provisions of the building by-laws under the Town Enactment (F.M.S. Cap. 137) — Whether in breach of Control of Rent Act, 1966, s. 16(1)(k).

Control of Rent Act — Complaint made by respondent to Town Council resulting in appellant's prosecution — Whether ground under s. 16(1)(k) of the Control of Rent Act is available to respondent.

Evidence — Whether record of conviction is admissible in evidence in civil proceedings — Plea of guilty admissible if relevant to the matter in issue.

The respondent in this case claimed for vacant possession of a two-storey shophouse from the appellant tenant on the ground that the appellant as tenant had contravened the provisions of section 16(1)(k) of the Control of Rent Act 1966. The appellant had erected an illegal partition on the premises in contravention of the building by-laws, and as a result of a complaint lodged by the respondent to the Town Council in respect of the unauthorised partition, the appellant was prosecuted and convicted on his plea of guilty in the lower court. The learned magistrate gave judgment for the respondent and ordered the appellant to give vacant possession of the premises